92-176

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

October Term, 1992

LEWIS BOLLER AND ALICE NICHOLAS,

*Petitioners,*

v.

WESTERN LAW ASSOCIATES, P.C., et al.,

*Respondents.*

**Petition For A Writ Of Certiorari To The Wyoming Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

JOHN M. BURMAN
CORTHELL & KING
P. O. Box 1147
Laramie, Wyoming 82070
(307) 742-3717

STEPHEN N. GOODRICH
PHILIP A. NICHOLAS*
P. O. Box 928
Laramie, Wyoming 82070
(307) 742-7140

Counsel for Petitioners
**Counsel of Record*

July 24, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

76

## QUESTIONS PRESENTED

1. Are victims of legal malpractice denied equal protection of the law in violation of the Fourteenth Amendment, by preferential application of a professional malpractice statute of limitations in a way that affords greater protection to lawyers than to members of other professions covered by the same statute?

2. Did the preferential holding of the Wyoming Supreme Court which was reached on grounds not pleaded or raised below, on unsupported facts, and without notice or opportunity for petitioners to present evidence or to be heard on the issues decided, deprive petitioners of their claims without due process of law, in violation of the Fourteenth Amendment to the U. S. Constitution?

3. The decision in the court below was unforeseeable because it was based on issues which had not been raised in the record, and on assumed facts and arguments for which there was no opportunity for hearing. Is the case for review more compelling because the judgment was the unexpected final act of a state supreme court for which there is no remedy other than certiorari to this Court?

## LIST OF PARTIES

The petitioners are Lewis Boller and Alice Nicholas.

The respondents are Western Law Associates, P.C., a professional corporation, and professional members of that firm, John L. Vidakovich, John T. Pappas, L. M. Chipley, Gregg A. Parish, and H. Cody Runyan, individually.

The Federal Deposit Insurance Corporation as Receiver of the Yellowstone State Bank of Lander, Wyoming was the original plaintiff in the trial court. While the matter was pending in the Wyoming Supreme Court, the FDIC Receiver dismissed all its claims against the petitioners in exchange for the petitioners' dismissal of all their claims against the Receiver. The Receiver is no longer a party to the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

Presentation of the Federal Questions; What the record contains ..... 7

ARGUMENT – SUMMARY ..... 10

REASONS FOR GRANTING THE WRIT ..... 11

I. A court decision which aids and protects lawyers more than other professionals who are similarly situated is harmful to the legal system, as well as to petitioners whose federal constitutional rights were violated

II. If the U.S. Supreme Court does not police the state court, then there is a federal constitutional wrong without a remedy

III. The Wyoming Supreme Court's action is contrary to decisions of this Court

CONCLUSION ..... 13

TABLE OF CONTENTS – Continued

Page

APPENDIX

A. Opinion of the Wyoming Supreme Court .... 1a

B. Dissenting opinion of Justices Thomas and Macy ..... 12a

C. Wyoming Statute § 1-3-107, entitled *Act, error or omission in rendering professional or health care services* ..... 18a

D. Petition for Rehearing ..... 20a

E. Brief on Petition for Rehearing ..... 23a

F. Affidavit of Petitioner Alice Nicholas in Support of Petition for Rehearing ..... 47a

G. Order Denying Petition for Rehearing ..... 51a

H. Extract from Respondent Runyan's answer brief on Appeal in the Wyoming Supreme Court ..... 52a

I. Extract from Petitioners' reply Brief on Appeal in the Wyoming Supreme Court ..... 55a

TABLE OF AUTHORITIES

Page

Section 1, Amendment XIV, United States Constitution ..... 2

Wyoming Statute, Section 1-3-107. *Act, error or omission in rendering professional or health care services* ..... 2, 5

CASES

*Banner v. Town of Dayton*, (Wyo. 1970) 474 P.2d 300 .... 11

*Bredthauer v. Christian, Spring, Seilbach and Assoc.*, (Wyo. 1992) 824 P.2d 560 ..... 11

*Creswill v. Knights of Pythias*, 225 U.S. 246 (1911) ..... 5

*Farbwerke, Meister Lucius & Bruning v. Chemical Foundation*, 29 F.2d 597 (D. Del. 1928), *aff'd*, 39 F.2d 366 (3rd Cir. 1930), *aff'd*, 283 U.S. 152 (1931) .... 12

*Fiske v. Kansas*, 274 U.S. 300 (1926)..... 5

*Hosey v. Club Van Cortlandt*, 299 F.Supp. 501 (S.D.N.Y. 1969) ..... 12

*Live Oak Water Users' Assn. v. Railroad Commission*, 269 U.S. 354 (1926) ..... 9

*Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934) ..... 9

*Lynum v. Illinois*, 368 U.S. 908 (1961) ..... 9

*Mills v. Garlow*, (Wyo. 1989) 768 P.2d 554..... 11

*Saunders v. Shaw*, 244 U.S. 317 (1917).....7, 12

*Scott v. McNeal*, 154 U.S. 34 (1894) ..... 12

*Sharsmith v. Hill*, (Wyo. 1988) 764 P.2d 667 ..... 11

*Yick Wo v. Hopkins*, 118 U.S. 356 (1886).....6, 12

No. _____

In The

# Supreme Court of the United States

October Term, 1992

LEWIS BOLLER AND ALICE NICHOLAS,

*Petitioners,*

v.

WESTERN LAW ASSOCIATES, P.C., et al.,

*Respondents.*

**Petition For A Writ Of Certiorari To The Wyoming Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

The petitioners Lewis Boller and Alice Nicholas respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Wyoming, entered in the above proceeding on April 3, 1992.

## OPINIONS BELOW

The opinion of the Wyoming Supreme Court is reported at 828 P.2d 1184. The majority opinion is reprinted in Appendix A, p. 1a, *infra*. The dissenting opinion is Appendix B, p. 12a.

## JURISDICTION

The decision of the Wyoming Supreme Court was entered on April 3, 1992. Appendix A, p. 1a, *infra*. Petitioners filed a Petition for Rehearing on April 20, 1992, which was denied on April 28, 1992. Appendix G, p. 51a *infra*. Petitioner's rights under the United States Constitution were denied by the highest court of Wyoming, Jurisdiction of this Court to review the decision is conferred under 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the due process and equal protection of the law provisions of Amendment XIV, United States Constitution. The statute involved is Wyoming Statute §1-3-107, which is the state statute of limitations on claims for acts, errors or omissions in rendering professional or health care services.

*Amendment XIV*. Section 1.

> . . . . nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person . . . the equal protection of the laws.

*Wyoming Statutes*. 1977 Republished Edition.

*Section 1-3-107*. Acts, error or omission in rendering professional or health care services.

> (a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be

brought within the greater of the following times:

> (i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after the discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
>
> (A) Not reasonably discoverable within a two (2) year period; or
>
> (B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence. . . .

## STATEMENT OF THE CASE

Respondents are lawyers, who were the founders, principal owners, principal officers and managers of a local state chartered bank. They were also attorneys for the bank. About two years before the bank was closed, they induced petitioners to become directors of the bank. Respondents were attorneys for the petitioners in bank matters. Petitioners relied on respondent lawyers for legal advice and protection.

Three years and one month after the bank closed, the FDIC as Receiver of the bank sued petitioners for loss of bank funds which had been paid out, ostensibly as loans, to respondent lawyers and to respondent's friends, business associates, clients and others. The money paid out as

"loans" had not received approval of the directors. With few exceptions as to smaller amounts, the petitioners did not know of the advance of funds for which they were sued. Petitioners cross-claimed against the respondent lawyers for whatever judgment the FDIC might recover, and damages caused by the attorneys' acts, omissions and malpractice.

Three years and six months after the bank closed, the respondent attorney Vidakovich was indicted and pleaded guilty to fraud under a plea bargain by which members of his family and his former law partner, respondent Pappas, would not be indicted.

The lawyers' involvements were concealed even from the bank examiners until long after the bank was closed. Because of secrecy imposed by the FDIC, the FBI, the U.S. Attorney's office, the federal grand jury, and the bank examiners, many significant and some essential facts are not yet known to the petitioners.

The trial judge stated that he harbored some doubt regarding petitioners' standing to sue the lawyers. On preliminary motions, he dismissed the complaints indicating that the supreme court ought to rule on that issue before incurring the time and expense of a trial. No answers had been filed. No evidence was received. There was no trial. Appeal was taken from the ruling on the motions.

However, on appeal, the Wyoming Supreme Court made findings and conclusions of fact. (Appendix A, pp. 4a, 6a-7a.) With no record, with no evidence, the appellate court found as facts that errors and omissions of the lawyers would 'definitely' have been discovered had

petitioners exercised diligence, and that petitioners did not exercise due diligence. There is nothing in the record or otherwise to support the factual findings and conclusions.

This Court does not generally review a state court's findings of fact. However, a finding of fact will be reviewed where a federal right has been denied as a result of a finding shown to be without evidence to support it, *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927), and where a conclusion of law as to a federal right and a finding of fact are so intermingled that it is necessary to analyze the facts in order to pass on the federal question, *Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912).

Based on the facts so found, the Wyoming Supreme Court held that all petitioners' claims against the lawyers were barred two years after the bank was closed. The consequence of the holding is, that claims against attorneys, including undiscovered and undiscoverable claims, are barred before the cause of action arises, before damage is incurred.

Prior to this case, the Wyoming Supreme Court uniformly held that the limitations period for professional malpractice claims does not begin to run until the claimant suffers actual damage. Those cases involved doctors, accountants, engineers, and surveyors, who are covered the same as lawyers by W.S. 1-3-107, the licensed professional malpractice statute.

The Wyoming Supreme Court gave no explanation why claims against lawyers would be treated differently than claims against other professionals covered by the professional malpractice statute. When a law is applied

by public authority in a way which differentiates between persons in similar circumstances, material to their rights, the denial of equal justice is repugnant to the Constitution. *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886).

Petitioners' due process rights were violated in several ways, procedurally and substantively. There was no notice that the statute of limitations would even be considered by the Court. There was no hearing whether the statute could be applied, and if so, how it should be applied. The Wyoming dissenting opinion summarizes the mass of Wyoming precedent which forbids consideration of issues that are raised for the first time on appeal. (Appendix B, p. 12a) The Wyoming Supreme Court violated its own rules and decisions to consider the issue.

Petitioners were denied the right to a factual hearing to establish when the limitations period began to run. The right to such a hearing is based on both the common law, and the Wyoming limitations statute itself. The statute provides that the two (2) year limitations period will be tolled,

> "*[I]f the claimant can establish* that the alleged act, error or omission was:
>
> (A) Not reasonably discoverable within the two (2) year period; or
>
> (B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence." (emphasis supplied)

The Wyoming Supreme Court decision foreclosed the petitioners from any opportunity to establish either (A)

or (B). The decision turned on the court's unsupported intuitive perception of the facts. Deprivation of the right to present evidence on the issue is the denial of due process. *Saunders v. Shaw,* 244 U.S. 317, 319 (1917).

Other than certiorari to this court, there is no remedy for violation of the U.S. Constitution by a state supreme court in its final decision.

**Presentation of the Federal Questions; What the record contains**

The federal issues were born in the unexpected decision of the Wyoming Supreme Court at the end of the state proceedings, on April 3, 1992. The decision is set forth in Appendix A, pp. 1a-17a.

The federal questions were immediately raised by petitioners and presented to the state supreme court in a Petition for Rehearing, and Brief in support of the petition, which were timely filed on April 20, 1992. There is no other method to bring the questions to the state court's attention. Because the unconstitutional act occurred in the final decision of the state's highest court, there is no way to obtain relief from the federal violations except by petition for certiorari to this Court. The U.S. Supreme Court granted relief under such circumstances in *Saunders v. Shaw,* supra, at 320.

Appendix D, beginning at p. 20a, is the Petition for Rehearing which petitioners presented to the Wyoming Supreme Court upon receiving its decision.

Appendix E, pp. 23a-46a, is the Brief on Petition for Rehearing. It is included to demonstrate that the federal

questions were fairly and inclusively brought to the attention of the state supreme court. Appendix F, pp. 47a-50a, is the Affidavit of Petitioner Alice Nicholas in Support of the Petition for Rehearing, annexed to the petition to demonstrate a meritorious factual basis for petitioners to prevail if given their day in court.

Appendix G, p. 51a, is the Order Denying Petition for Rehearing entered by the Wyoming Supreme Court.

The record contains nothing regarding this matter other than the petitioners' initial allegations that their claims were timely filed. Of the entire record in the case, only the petitioners' complaints against the respondents, the motions to dismiss, and the state supreme court's decision bear on the questions before this Court. Except for the final state supreme court opinion, nothing in the record below created, or gave reason to anticipate a federal question.

The pertinent allegations in the petitioners' separate complaints, which are nearly identical except for the gender pronouns, are as follows:

> (b) Plaintiffs cross-claims and third party claims matured, that is they first became actionable claims for relief, in January, 1988, when plaintiff learned that the Receiver had prepared and would press claims against him. Several did not mature until November-22, 1988, when he received the Complaint in this action containing new disclosures. Several matured more recently upon more recent discoveries. Plaintiff has not undertaken to catalog the dates of each new discovery, it being apparently sufficient at this

> time to concern regarding only the earliest dates. . . .
>
> . . . plaintiff recently discovered the negligent conduct and other violative and insufficient conduct which is the subject of this claim . . . .
>
> . . . The defendants services were rendered under circumstances as gave rise to individual causes of action on behalf of individual directors. Those causes of action do not mature until the director's discovery of the negligence. None of those claims in this case matured before January of 1988, when the Receiver first threatened this plaintiff regarding matters as to which he had reasonably relied upon the professional legal services of defendants.

There is nothing further in the record which relates to this matter until the Wyoming Supreme Court decision appears at the end.

The extracts from briefs which were filed in the Wyoming Supreme Court, which are in the Appendix, are included as background of the case and not as part of the record. Petitioners recognize that briefs are not part of the record, as observed in *Live Oak Water Users' Assn. v. Railroad Commission*, 269 U.S. 354, 359 (1926), *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54, (1934), and applied specially in *Lynum v. Illinois*, 368 U.S. 908 (1961). However, the opinion of the Wyoming Supreme Court seized upon an argument from the appellate brief of respondent Runyan. Runyan's appellate brief was the first mention in the case of the statute of limitations.

Appendix H, p. 52a, is the entirety of the language in the Runyan brief to which the opinion refers. Appendix I, p. 55a, is petitioners' response in their appellate reply brief.

There was no mention of a statute of limitations contention at the oral argument in the state supreme court on October 12, 1990.

## ARGUMENT – SUMMARY

The Wyoming Supreme Court unconstitutionally,

1. applied the statute of limitations in a way which deprived the petitioners of their claims against lawyers, claims that in all material aspects are the same as claims uniformly allowed against other professionals similarly situated. Petitioners were denied equal protection of the law.

2. made conclusive findings of fact which are unsupported, and based solely on judicial speculation. The court decided the case based on such findings, thereby depriving petitioners the right to present evidence bearing on the facts and issues. Petitioners were deprived of their claims without due process of law.

3. decided the case on a statute of limitations issue which was not pleaded by any opposing party, nor heard, nor otherwise raised prior to the appeal. The state's highest court thereby unexpectedly violated the court's own decisions at the last stage of the appeal, and terminated the case in such manner as to deprive petitioners of any remedy for deprivation of their constitutional rights, except that this Court grants certiorari.

## REASONS FOR GRANTING THE WRIT

I. Court decisions favoring lawyers receive public scrutiny. Preferential treatment for lawyers seriously undermines public confidence in the fundamental fairness of the justice system. It suggests closed ranks, self-interest and cynical rather than even-handed justice. In addition to the violation of constitutional guarantees, the appearance of preferential treatment is inimical to the American legal system.

If any benefits may accrue in the short term by not permitting errant lawyers to be sued, in the long term disparity of treatment is destructive of our government.

The Wyoming decision distorts the law by specially protecting lawyers from prolonged jeopardy of undiscovered malpractice. The distortion is by the same court which has continuously subjected other licensed professions to liberally extended jeopardy by decisions which apply the same statute of limitations. *Bredthauer v. Christian, Spring, Seilbach and Assoc.*, (Wyo. 1992) 824 P.2d 560 (surveyor's error); *Mills v. Garlow*, (Wyo. 1989) 768 P.2d 554 (accountant's error); *Sharsmith v. Hill*, (Wyo. 1988) 764 P.2d 667 (medical malpractice); *Banner v. Town of Dayton*, (Wyo. 1970) 474 P.2d 300 (engineer's error). The legislature adopted the two year limitations statute, including in it explicit provision for a claimant to establish extended periods as to undiscovered claims, applicable to all licensed professionals in the same way as it applies to lawyers. It is unconstitutional to deny these claimants equal application of the statute.

II. Without certiorari to this Court, the deprivation of due process and denial of equal protection by a state

supreme court are wrongs without a remedy. Absence of remedy confers a virtual license for a state supreme court to violate the federal Constitution. The unjust state court decision becomes the supreme law.

III. The decisions of this Court with which the Wyoming Supreme Court conflicts are legion. The following cited cases are quoted, followed and cited with approval in scores of subsequent and more recent decisions of this Court.

> A law which is fair on its face, when applied and administered with an unequal hand constitutes denial of equal protection of the laws secured by the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886). Deciding a case on appeal on its merits without affording the litigant opportunity to present his evidence is a denial of due process of law. *Saunders v. Shaw,* 244 U.S. at 319. The requirements of due process and equal protection of the law bind the judicial as well as other political branches of the government. *Saunders v. Shaw,* 244 U.S. at 320, *Scott v. McNeal,* 154 U.S. 34, 45 (1894), and cases collected in *Hosey v. Club Van Cortlandt,* 299 F.Supp. 501, n. 21, 22, 23. 506 (S.D.N.Y. 1969). Choses in action are property within Constitutional protections. *Farbwerke, Meister Lucius & Bruning v. Chemical Foundation,* 29 F.2d 597, 602 (D. Del. 1928), *aff'd,* 39 F.2d 366, 371 (3rd Cir. 1930), *aff'd,* 283 U.S. 152 (1931).

## CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

In view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal.

Respectfully submitted,

JOHN M. BURMAN
CORTHELL & KING
P. O. Box 1147
Laramie, Wyoming 82070
(307) 742-3717

STEPHEN N. GOODRICH
PHILIP A. NICHOLAS*
P. O. Box 928
Laramie, Wyoming 82070
(307) 742-7140

Counsel for Petitioners
*Counsel of Record*

July 24, 1992

# APPENDIX

## APPENDIX A

**In the Supreme Court, State of Wyoming**

**October Term, A.D. 1991**
April 3, 1992

| | | |
|---|---|---|
| LEWIS BOLLER and ALICE NICHOLAS, | ) | |
| Appellants (Third-Party Plaintiffs), | ) | |
| v. | ) | No. 90-84 |
| WESTERN LAW ASSOCIATES, P.C., JOHN T. PAPPAS, L.M. CHIPLEY, H. CODY RUNYAN, and GREGG A. PARISH, | ) | |
| Appellees (Cross-Defendants and Third Party Defendants). | ) | |
| v. | ) | |
| JOHN L. VIDAKOVICH, | ) | |
| Appellee (Defendant). | ) | |

**Before THOMAS, CARDINE, and MACY, JJ.; RAPER and ROONEY, Ret. JJ.**

ROONEY, Ret. J., delivered the opinion of the court. THOMAS, J., filed a dissenting opinion in which MACY, J. joined.

ROONEY, Justice, Retired.

This appeal is from an order granting appellees' W.R.C.P. 12(b)(6) motion[1] to dismiss appellants' third-party complaints for failure to state a claim upon which relief could be granted. The claims contained in the original and amended complaints against appellants have been settled and are not involved in this appeal.

We affirm.

Although the appeal is predicated on issues relative to presentation of elements of negligence in the third-party complaints sufficient to withstand the motion to dismiss, we need not address such issues since we agree with appellee Runyan's contention that appellants' third-party claims are barred by the statute of limitations.

Appellants were two of the directors of the Yellowstone State Bank. The Bank was closed November 1, 1985, and the Federal Deposit Insurance Corporation was appointed receiver of the bank for the purpose of liquidating its assets. In the process of doing so, it filed suit against the directors of the bank alleging that the failure of the bank was caused by specified actions and inactions of the directors contrary to their duties with reference to approving loan transactions.

---

[1] W.R.C.P. 12 provides in pertinent part:

"(b) *How presented.* – Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted, * * * "

Appellants responded in separate third-party complaints against appellees that, among other things, their actions or inactions were a result of negligence on the part of appellees consisting of appellees' failure to furnish proper legal advice and guidance to appellants.

Wyo. Stat. § 1-3-107 (1988) provides in pertinent part:

> "(a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:
>
> > "(i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
> >
> > > "(A) Not reasonably discoverable within a two (2) year period; or
> > >
> > > "(B) That the claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence."

Appellant Runyan appropriately argues.

> "The First Amended Complaint reveals that the 20 specific loans upon which losses were taken and which in turn resulted in the cause of action against appellants occurred between February 28, 1983 and August 21, 1985. It stands to reason, then, that any act, error or omission which caused the making of one of those loans would have occurred before August 21, 1985.

> Two years from that date would have been August 21, 1987. Another date that the Court might consider, which date is undisputed, is that the bank was closed on November 1, 1985, two years from that date, of course, being November 1, 1987. The Third Party Complaints were filed on August 14, 1989. Without any questions or even dispute, more than two years elapsed after any alleged act, error or omission which generated any of those loan losses."

In their third-party complaints, appellants recite that they "recently discovered the negligent conduct," subject of the claim against appellees, and they now contend that the exceptions contained in Wyo. Stat. § 1-3-107 prevent the running of the statute of limitations. The fact of "discovery" is not determinative for this purpose. The question is whether or not the acts, errors or omissions constituting negligence by appellants were "reasonably discoverable within a two (2) year period" and whether or not "due diligence" was exercised by appellants to discover the acts, errors or omissions within the two year period.

"Wyoming is a 'discovery' state, which means that the statute of limitations is not triggered until the plaintiff knows *or has reason to know* the existence of the cause of action." *Mills v. Garlow*, 768 P.2d 554, 555 (Wyo. 1989) (emphasis added).

When the bank was closed on November 1, 1985, "due diligence," on the part of appellants would certainly require determination as to the reason for the closure and if appellees' negligence was a contributing reason for the closure, as appellants now contend, the claim against

appellees would mature at that time. If the closure was a result of appellees' negligence, as now contended by appellants, such was definitely "reasonably discoverable" at the time of the closure or within a few months thereafter. Appellants had reason to know of the existence of their potential claim for relief against appellees when the bank was closed.

Appellants also argue that the statute of limitations issue should not be considered on appeal inasmuch as it was not presented to the district court. We consider this argument together with a procedural issue (not argued by appellants) relative to whether or not a statute of limitations defense can be considered under a W.R.C.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

W.R.C.P. 8 provides in pertinent part:

> "(c) *Affirmative defenses.* – In pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations * * * ."

However, we have long held that if the defense appears on the face of the complaint, the complaint is subject to a demurrer. *Bonnefield v. Price,* 1 Wyo. 172 (1874); *Cowhick v. Shingle,* 5 Wyo. 87, 37 P. 689 (1894); *Columbia Savings & Loan Ass'n v. Clause,* 13 Wyo. 166, 78 P. 708 (1904); *Union Stockyards National Bank of South Omaha, Neb. v. Maika,* 16 Wyo. 141, 92 P. 619 (1907); *Horse Creek Conservation District v. Lincoln Land Company,* 54 Wyo. 320, 92 P.2d 572 (1939). *See also Upton v. McLaughlin,* 105 U.S. 640, 26 L.Ed. 1197 (1881). The obvious reason for so holding is that a complaint which, on its face, is out of

time cannot logically state a claim for which relief would be proper.

The same reason exists when the complaint is challenged by the demurrer's successor, a motion to dismiss for failure to state a claim upon which relief can be granted, i.e., by a W.R.C.P. 12(b)(6) motion.

> "In a number of jurisdictions where motion practice has been adopted and a motion to dismiss the complaint takes the place of a demurrer raising the issue of no cause of action, the courts have adopted the rule that if on the facts stated in the complaint, the action would be barred by limitations, the complaint may be dismissed on motion. It has also been held that the total effect of the various provisions of the Federal Rules of Civil Procedure, and similar state rules of practice, is to permit the defense of limitations to be raised by a motion to dismiss, where it appears from the complaint that the action is barred."

51 AM.JUR.2D *Limitation of Actions* § 468 (1970).

The answers, counterclaims, cross claims and initial third-party claims separately filed by appellant Boller and appellant Nicholas reflect on their faces that the third-party claims are barred by the two-year statute of limitations. They recite the closure of the bank on November 1, 1985. They were not filed until August 19, 1989.

The cross claims list several instances in which appellees are alleged to have negligently furnished, or failed to furnish legal advice and guidance to appellants. The failure of the bank gave appellants "reason to know that the alleged negligence existed at that time with reference to

those instances,[2] thereby precluding application of the exceptions contained in Wyo. Stat. § 1-3-107. Since the face of the third-party complaints reflected the closure of the bank, which gave reason for appellants to inquire into and know of the existence of the alleged instances of negligence and which alleged negligence could have been discovered shortly thereafter through the exercise of due diligence, the claims in such third-party complaints are barred by the two-year statute of limitations.

---

[2] With reference to such instances, each appellant alleged as follows in their separate third-party complaints.

> "Examples of that are: negligent advice and direction in setting up the bank operations, providing the format and pattern for future bank activities, e.g., negligence in the taking, transcription, preparation, approval, authentication and preservation of minutes of director's meetings and committee meetings, wherein the minutes are seldom, if ever, complete, usually reported in two or three paragraphs on a single page to described long meetings which covered dozens of topics that are not mentioned in the minutes. The minutes of several meetings were often accumulated, then circulated among the directors for signatures. Signatures were added ritualistically with little opportunity for reading or examining and correcting them. Counsel failed to advise the bank and the directors that the directors had serious responsibility in respect to the minutes. Another example is the advice given the bank and the directors that things which occurred in the board room were so confidential and secret, that no lists or schedules, or copies of minutes, or notes made by board members during meetings should be removed

(Continued on following page)

In this case, there is an additional practical reason for applying the statute of limitations under a W.R.C.P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, and for addressing the issue on appeal although it was not presented to the district court.

In this appeal, appellants contend: (1) that their pleadings set forth a claim sufficient to withstand a motion to dismiss, and (2) in any event, they should have

---

(Continued from previous page)

from the board room by a director, rather, had to be left in the board room and gathered up by the secretary. That type of negligently delivered advice, and direction, became the pattern, the practice, the standard of procedure. Erroneous legal advice reaffirming the correctness of such practices and procedures was restated and reaffirmed at each meeting thereafter when an attorney was in attendance; if not expressly in so many words, expressly by the presence of one or more members of the law firm who observed and countenanced the reperformance of the same practices and procedures, as if that were entirely correct and the inviolable order of things. The commission of the same type of negligent conduct, and casual repeat thereof, occurred regarding the signing and adoption of minutes as if such were only ceremonial. Such negligence involved active, misleading advice and direction, and also negligent omission. The defendant legal professionals held themselves out as competent to set up, guide and direct the legal aspects of the bank and its operations, including advising and guiding the directors in their functions, affecting a competence in banking affairs which they did not have, or if they had, they failed to exercise and utilize it. The defendants were not competent in the field but negligently held themselves out to be so."

been afforded an opportunity to amend their pleadings. In either case, appellees would have to file an answer. The answer would then affirmatively set forth the statute of limitations defense. In all likelihood, the resulting district court's ruling in favor of appellees would be appealed to this court. Judicial economy dictates addressing the statute of limitations issue at this time rather than after the removal and second appeal. This is not to say that we would agree or disagree with either party on the other issues presented in this appeal.

Finally, we recognize that the statute of limitations is applicable only when affirmative relief is sought. In this case, the application of the statute is to third-party claims. Thus, it is necessary to determine the objective of such claims.

> "The purpose of limitation provisions is to bar actions and not suppress or deny matters of defense, and the general rule is that limitations are not applicable to defenses but apply only where affirmative relief is sought."

*Hawkeye-Security Insurance Co. v. Apodaca*, 524 P.2d 874, 879 (Wyo. 1974).

The rule that limitation statues are not applicable to defenses, but apply

> "only in the case of strict defenses, and, in the absence of statute, does not apply to cases of set off or counterclaim. * * *
>
> * * *
>
> "In the absence of a statue [sic] to the contrary, a demand pleaded by way of a setoff, counterclaim, or cross claim is regarded as an

affirmative action in most jurisdictions and therefore, unlike a matter of pure defense, is subject to the operation of the statute of limitations, and is unavailable if barred."

51 AM.JUR.2D *Limitation of Actions* §§ 76 through 78 (1970).

Appellants' third-party complaints specifically request affirmative relief. Among other things, appellant Boller alleges:

> "As a further result, this plaintiff has suffered and is suffering emotional distress, mental disturbance, disruption of his life and social, personal and business affairs, loss of time, loss of income, loss of earnings, loss of personal and self esteem, loss of standing in the community, impairment of ability to perform his other tasks in life, and loss of enjoyment of life; all to his damage in a sum as great as fifty times over the accrued attorneys fees and costs today, which personal and general damage is on-going and increasing, and is very likely to increase at a much faster rate than will the actual damages for costs and expenses and attorneys fees; all of which will continue to occur and increase for as long as this litigation against him continues; for all of which he demands damages in such sum as shall be proved at the trial. Plaintiff also demands his costs herein and such other relief as is just."

And, among other things, appellant Nicholas alleges the foregoing in the same words as does appellant Boller, except that she also alleges "loss of consortium" and she alleges the present damage to be "a sum as great as ten times over the accrued attorneys' fees and costs today,"

rather than "fifty times over the accrued attorneys' fees and costs today" as alleged by appellant Boller. Appellant Boller alleges expenses and attorney's fees reasonably incurred in his defense to be "about $25,000, not including several items of expense for which statements have not been received," whereas appellant Nicholas alleges the amount expended therefor as of August 3, 1989 to be "$102,520.90, not including several items of expense for which statements have not been received."

Accordingly, the statute of limitations operates to bar appellants' claims against appellees.

Affirmed.

---

## APPENDIX B

THOMAS, Justice, dissenting, with whom MACY, J., joins.

I cannot agree with the disposition of this case on the basis of a conclusion that the claim was barred by the statute of limitations. The invocation of the protection of the statute of limitations is an affirmative defense that should be raised by the pleadings. That did not occur in this case, nor was the issue even considered in the trial court where the case was dismissed for failure to state a claim. The majority disposition is erroneous. I would hold that the complaint adequately states a claim and remand the case to the trial court for further proceedings.

I initially note that, despite the claim made in the majority opinion justifying this disposition on the basis of "judicial economy," we should not disregard our long-standing rule that forbids the consideration of issues that are raised for the first time on appeal. Acceptance of the argument concerning the statute of limitations, followed by deciding the case on that basis, is directly contrary to precedent that has served this court and the interests of justice in an exemplary fashion for many years. *See Squaw Mountain Cattle Co. v. Bowen*, 804 P.2d 1292 (Wyo. 1991); *Epple v. Clark*, 804 P.2d 678 (Wyo. 1991); *Esponda v. Esponda*, 796 P.2d 799 (Wyo. 1990); *U.S. Aviation, Inc. v. Wyoming Avionics, Inc.*, 664 P.2d 121 (Wyo. 1983); *Roush v. Roush*, 589 P.2d 841 (Wyo. 1979); *Thickman v. Schunk*, 391 P.2d 939 (Wyo. 1964); *Gore v. John*, 61 Wyo. 246, 157 P.2d 552 (1945); *Ideal Bakery v. Schryver*, 43 Wyo. 108, 299 P. 284 (1931).

My second concern is that, even though the majority relies upon the proposition that " 'Wyoming is a "discovery state" which means that the statute of limitations is not triggered until the plaintiff knows *or has reason to know* the existence of the cause of action,' " the quoted concept in the context of this record is erroneous. Slip op. at 2, quoting *Mills v. Garlow*, 768 P.2d 554, 555 (Wyo. 1989). The majority theorizes that the facts demonstrating the elements of this principle have been sufficiently established to avoid any possible tolling of the applicable statute of limitations. The majority argues, on behalf of the appellees, that since the bank was closed on November 1, 1985 and, through the exercise of " 'due diligence' " any negligence on the part of the appellees would have been " 'reasonably discoverable' at the time of the closure or within a few months thereafter." Slip op. at 2.

This conclusion depends upon a degree of omniscience that this court heretofore has been denied. It assumes a knowledge of facts that were never addressed in the pleadings. Neither this court nor the trial court, other than by conjecture and assumption, has any real capacity to ascertain whether "the plaintiff knows or has reason to know the existence of the cause of action." *Mills*, 768 P.2d at 555. The simple recognition of the date of the closing of the bank as compared with the date of the filing of the complaint does not suffice to cure this omission. For that reason, applying our usual concepts regarding motions made under Wyo. R. Civ. P. 12(b)(6), the court should not seriously entertain a dismissal on the basis of a violation of the statute of limitations at this time.

*See Mummery v. Polk*, 770 P.2d 241 (Wyo. 1989); *Champion Well Service, Inc. v. NL Industries*, 769 P.2d 382 (Wyo. 1989).

Any such order can be sustained only when it is clear on the face of the complaint that the plaintiff is not entitled to relief. *Paravecchio v. Memorial Hospital of Laramie County*, 742 P.2d 1276 (Wyo. 1987), *cert. denied* 485 U.S. 915, 108 S.Ct. 1088, 99 L.Ed.2d 249 (1988). *Cf. In re Sullivan's Estate*, 506 P.2d 813 (Wyo. 1973) (dismissal under Rule 12(b)(6) is appropriate when statute of limitations itself is reflected on face of complaint). In this instance, the claims that the majority speculates were barred by the statute of limitations were raised in the separate answers of Boller and Nicholas as defendants. They were presented as counterclaims, cross-claims, and third-party claims in the answers and amendments thereto. The allegations include the fact that the third-party plaintiff "recently discovered the negligent conduct"; the fact that the negligent conduct commenced at the time the bank opened and continued "even after the bank was closed"; and that "None of the claims in this case mattered before January of 1988, when the Receiver first threatened this plaintiff regarding matters to which he had reasonably relied upon the professional legal services of defendants."

The third-party defendant's motion to dismiss is presented under Wyo. R. Civ. P. 12(b)(6), and the facts alleged must be taken as true for the purpose of the motion. A dismissal under 12(b)(6) may be appropriate if the defense of the statute of limitations is raised. *Horn v. Burns and Roe*, 536 F.2d 251 (8th Cir. 1976). The only third-party defendant who did raise the defense of the statute

of limitations no longer is a party in this case. The others have failed to accommodate to the standard found in *Stryker v. Rasch*, 57 Wyo. 34, 112 P.2d 570, 136 A.L.R. 770, *reh'g denied*, 113 P.2d 963 (1941), that the statute of limitations is an affirmative defense that must be presented in the first responsive pleading and must be relied upon. The failure to affirmatively plead this defense operates as a waiver permitting the plaintiff to recover even when the period of limitations has expired. 51 Am.Jur.2d *Limitation of Actions* § 457 (1970).

Furthermore, so far as this court knows, every element of an estoppel to assert the statute of limitations might well have been presented had that defense been raised in the trial court. This court has recognized that a party may be estopped from asserting the statute of limitations in an instance in which a party could show that the delay was induced by the defendant who misled the plaintiff after which the plaintiff acted upon the misinformation in good faith. *Taylor v. Estate of Taylor*, 719 P.2d 234 (Wyo. 1986). We also have recognized that the fraudulent concealment of facts necessary to a cause of action can estop the assertion of the statute of limitations. *Olson v. A.H. Robins Co., Inc.*, 696 P.2d 1294 (Wyo. 1985). In addition, we have acknowledged the possibility that a defendant may lull the claimant into a reasonable belief that his claim would be settled without suit. *Turner v. Turner*, 582 P.2d 600 (Wyo. 1978). It is recognized that no tolling was effected in any of the cited cases, but the legal principles upon which tolling might occur are fairly well defined. Those legal issues can only be resolved upon the basis of facts addressed to the issue of the statute of limitations, and this record is totally devoid of those facts

because the appellees failed to assert that defense in the trial court.

In this regard, I find I am troubled by the refusal of the majority to recognize the roles that various parties to this appeal have played in these circumstances. The performance of those particular roles might well have adversely affected the ability of the appellants to have "discovered" their cause of action, at least to the extent of questioning whether the statute of limitations should be tolled. The underlying problem in this case involves fraud on the part of certain bank officers. Absent any evidence to the contrary, I must concede that those charged could have at least plausibly, gone to great lengths to conceal their wrongdoing. Discovery of the cause of action might very well have been delayed under the circumstances. *See American Sur. Co. v. Pauly,* 170 U.S. 133, 18 S.Ct. 552, 42 L.Ed. 977 (1898); *Federal Deposit Ins. Corp. v. Aetna Cas. & Sur. Co.,* 426 F.2d 729 (5th Cir. 1970); *Alfalfa Elec. Co-op, Inc. v. Travelers Indem. Co.,* 376 F. Supp. 901 (W.D. Okla. 1973); *Federal Deposit Ins. Corp. v. National Sur. Corp.,* 281 N.W.2d 816 (Iowa 1979); *National Newark & Essex Bank v. American Ins. Co.,* 79 N.J. 64, 385 A.2d 1216 (1978).

In my judgment, it is wrong for this court to invoke the statute of limitations in the interests of "judicial economy" to deny these parties their day in court. The rules relating to the acceptance of the truth of the averments of a party in the context of a motion to dismiss pursuant to Wyo. R. Civ. P. 12(b)(6), the pleading of the statute of limitations as an affirmative defense or waiver if it is not pleaded, and the appellate discipline foreclosing consideration of an issue that is not initially presented to the

trial court, all militate against the majority resolution. Their effect is overwhelming. I would reverse and remand for further proceedings in the trial court.

---

## APPENDIX C

WYOMING STATUTES 1977
REPUBLISHED EDITION

CH. 3, Limitation of Actions

**§ 1-3-107. Act, error or omission in rendering professional or health care services.**

(a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:

(i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:

(A) Not reasonably discoverable within a two (2) year period; or

(B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

(ii) For injury to the rights of a minor, by his eighth birthday or within two (2) years of the date of the alleged act, error or omission, whichever period is greater, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:

(A) Not reasonably discoverable within the two (2) year period; or

(B) That the claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

(iii) For injury to the rights of a plaintiff suffering from a legal disability other than minority, within one (1) year of the removal of the disability;

(iv) If under paragraph (i) or (ii) of this subsection, the alleged act, error or omission is discovered during the second year of the two (2) year period from the date of the act, error or omission, the period for commencing a lawsuit shall be extended by six (6) months.

(b) This section applies to all persons regardless of minority or other legal disability. (Laws 1976, ch. 18, § 1; W.S. 1957, § 1-18.1; Laws 1977, ch. 188, § 1.)

---

## APPENDIX D

IN THE SUPREME COURT, STATE OF WYOMING

| | | |
|---|---|---|
| LEWIS BOLLER and ALICE NICHOLAS, Appellants (Third-Party Plaintiffs), | ) | |
| v. | ) | No. 90-84 |
| WESTERN LAW ASSOCIATES, P.C., JOHN T. PAPPAS, L. M. CHIPLEY, H. CODY RUNYAN and GREGG A. PARISH, Appellees (Third-Party Defendants), and JOHN L. VIDAKOVICH, APPELLEE (Cross-Defendant). | ) | FILED APRIL 20, 1992 |

### PETITION FOR REHEARING

The appellants respectfully petition the Court for rehearing. The points wherein it is alleged that the court erred are:

I. There was nothing in or about the closing of the bank to alert appellants of their claims against the appellees. Appellants relied on information received from the appellees as to why the Bank closed, which information was reasonable, corroborated and partly correct. The wrongful and injurious elements were concealed by appellees.

II. Appellants were prevented by substantive law from suing the appellees during the first two years after the bank was closed. Without injury they had no cause of action. Their claims would have been non-suited.

III. The decision effectively singles out the legal profession as a limited class for special protection, placing added burden on the appellants who were injured by lawyers. It denies appellants equal protection and uniform operation of the law.

IV. The appellants have been deprived of property without due process of law by the finding of facts against them without notice or an opportunity to be heard and the loss of the benefit of appellees' waiver of the statute of limitations.

V. The Court erred in dismissing appellants' claims which are not subject to the two-year statute of limitations.

Wherefore, the appellants respectfully pray that the Court grant a rehearing in this matter.

/s/ John M. Burman
John M. Burman
Corthell & King
P. O. Box 1147
Laramie, Wyoming 82070
(307) 742-3717
Attorney for Appellants

/s/ Stephen N. Goodrich

Stephen N. Goodrich
Nicholas Law Firm
P. O. Box 928
Laramie, Wyoming
(307) 742-7140
Attorney for Appellants

---

## APPENDIX E

IN THE SUPREME COURT, STATE OF WYOMING

| | | |
|---|---|---|
| LEWIS BOLLER and ALICE NICHOLAS, Appellants (Third-Party Plaintiffs), | ) | |
| v. | ) | No. 90-84 |
| WESTERN LAW ASSOCIATES, P.C., JOHN T. PAPPAS, L. M. CHIPLEY, H. CODY RUNYAN and GREGG A. PARISH, Appellees (Third-Party Defendants), | ) | (Filed April 20, 1992) |
| and | ) | |
| JOHN L. VIDAKOVICH, APPELLEE (Cross-Defendant). | ) | |

BRIEF on PETITION FOR REHEARING

Appellants submit that the Petition for Rehearing should be granted for five primary reasons:

I. There was nothing in or about the closing of the bank to alert appellants of their claims against the appellees. Appellants relied on information received from appellees as to why the Bank closed, which information was reasonable, corroborated and partly correct. The wrongful and injurious elements were concealed by appellees.

II. Appellants were prevented by substantive law from suing the appellees during the first two years after the bank was closed. Without injury they had no

cause of action. Their claims would have been non-suited.

III. The decision effectively singles out the legal profession as a limited class for special protection, placing added burden on the appellants who were injured by lawyers. It denies appellants equal protection and uniform operation of the law.

IV. The appellants have been deprived of property without due process of law by the finding of facts against them without notice or an opportunity to be heard and the loss of the benefit of appellee's waiver of the statute of limitations.

V. The court erred in dismissing appellants' claims which are not subject to the two-year statute of limitations.

This brief, statements, facts and argument, are supported by Appendices for which there is a complete index at Appendix 15, including the affidavit of appellant Alice Nicholas annexed as Appendix 14. The following is a list of the appendices:

1. The Preliminary Averments which were a part of all the Third-party Claims and Crossclaims.

2. Amended, Supplemental Fourth Claim, against Western Law Associates, Vidakovich, Chipley, Parish and Runyan.

3. Refiled Supplemental Third Claim, against Pappas.

4. Motion to Dismiss by Western Law Associates, a P.C.

5. Motion to Dismiss by appellee Chipley.

6. Motion to Dismiss by appellee Parish.

7. Motion to Dismiss by appellee Runyan; and copy of the Brief in support of the motion.

8. Vidakovich's later Answer to the Amended Complaint.

9. The District Court's Order dismissing the claims.

10. Pertinent pages from Runyan's Brief on Appeal on this Court.

11. Pertinent pages from appellants' Rely [sic] Brief on Appeal in this Court.

12. Letter from appellant Alice Nicholas to the FDIC Receiver on April 2, 1986.

13. Letter from FDIC Receiver's Colorado attorney to appellant Alice Nicholas dated December 14, 1987.

14. Affidavit of appellant Alice Nicholas in support of this Brief.

15. Detailed index of the Appendices, on which the page numbers of the record are more clear.

I. Why the bank was closed.

The reasons the Yellowstone State Bank ("the Bank") was closed, so far as known to appellants and as represented to appellants by the appellees, had nothing to do with legal matters, negligence or any activity relating to claims in the FDIC Receivers' action.

The following account of appellants' knowledge of why the bank was surrendered to the State Examiner, and

why and how it was closed, is based on representations to the appellants at the time, and information received from the FDIC Receiver at and after appellants' January, 1988 meeting with the FDIC Receiver. The account shows that appellants had no knowledge of their claims against appellees until 1988, and no reason to know of those claims. Despite appellants' exercise of due diligence in the matter, there was no way to discover their claims before 1988.

A. Changes in Federal Reserve Bank and FDIC Standards

In 1983 and 1984 the Federal Reserve Bank and the FDIC ("the regulators") amended their standards for assessing the soundness of bank loans. Before 1983-84, the standards related principally to: (1) the value of the collateral pledged to secure repayment; (2) the credit history of the borrower; (3) the character of the borrower; and (4) the net worth of the borrower. The borrower's cash flow and net income were considered, but treated as less significant.

The new Federal standards paid little regard to the character and net worth of the borrower and even less regard to the value of the collateral because too many lending institutions were suffering severely from devaluation of collateral after the fluctuating interest rate debacle of the early 1980's. It became mandatory that each borrower present an historic, demonstrable cash flow and net income sufficient to regularly service repayment of the loan. The latter factor was not published. Although appellees Vidakovich and Pappas were advised

by regulators of these mandatory factors, that information was not made known to the appellants until just before the Bank was surrendered.

B. The effect of new standards on Yellowstone State Bank.

As appellants learned later, the regulators administratively decided to allow each bank a period of time to 'work down' its portfolio of loans which did not meet the new standards. At each periodic bank examination a proportion of loans which did not fulfill the new standard would be re-classified as 'sub-standard'. Perhaps in 1984 and certainly through 1985, at each Bank examination the examiners re-classified many Bank loans which had been passed and approved under the old standards – loans which were not backed by 'cash flow/net income' to service repayment.

Loans so re-classified were deducted from the assets column of the Bank's balance sheet. The threat of re-classification forced the Bank to pressure the borrowers to create a current business 'cash flow' or to pay the loans off, even if prematurely. If the borrower were unable to do so before the loan was so 'classified', the Bank was required to 'charge the loan off' the Bank's books, as if there were no such loan. When that process resulted in the Bank's balance sheet reflecting assets valued at or below a preassigned percentage over its liabilities, the regulators and the State Examiner gave notice of 'possible impairment of capital' and issued 'calls' that the Bank must infuse more capital to increase the value of the Bank's assets to the assigned percentage over liabilities.

The Bank officers, particularly Vidakovich and Pappas represented to the appellants that the Bank's loans which were charged off during the summer of 1985 were charged off for that reason. That apparently was not true. The truth is not yet known to appellants.

Appellants were advised by Vidakovich and Pappas that, as a result of that process, the State Examiner requested the Bank's directors meet at his office in Cheyenne in late October 1985. The State Examiner and representatives of the Federal Reserve Bank and the FDIC attended. The FDIC served notice that unless an additional $1,500,000 capital were infused within a few weeks, the FDIC would withdraw its insurance of the depositors' accounts. Cancellation of that insurance would cause the depositors to withdraw their deposits, and the Bank could not remain profitable. There was no reasonable likelihood the additional capital could be raised within a period of time the regulators would allow.

The State Examiner and the FDIC representatives explained that if the directors voluntarily surrendered the Bank to the State Examiner, as provided for by state statute, at the close of the business day on November 1, 1985 (a Friday), the FDIC would arrange an immediate sale of the Bank's assets to a larger, better capitalized bank, and that the bank would re-open the following Monday under a new name, keeping the same employees but with new management. With that assurance, the directors voted to surrender the Bank to the State Examiner on November 1, 1985.

The Bank was surrendered. It was a profitable business at the time, as the independent auditors certified to

the directors. The Bank was solvent at the time, as the auditors certified. Exclusive of the sound loans already charged off under the new standard, its assets exceeded its liabilities. The State Auditor would have testified at the trial of the plaintiff FDIC's case, had there a trial, that it was a mistake for the FDIC to close the bank.

C. Appellants have been unable to learn precisely what transpired after the Bank's closure.

At the request of the State Examiner the FDIC immediately seized all of the Bank's records. The bank employees were sworn to secrecy. The responsible federal agents have refused to provide any information and have denied all access to the Bank's records. The particulars of what happened after the Bank was turned over to the State Examiner are deliberately kept secret by the regulators. No reason for this is apparent other than the claim that all their activities are confidential and only the "chairman" of the FDIC can reveal information.

Appellants are informed by a banker who participated in the bidding to acquire the Bank, that the FDIC arranged on the following Saturday to sell the Bank to a larger bank, as agreed. Appellants are informed and believe the purchaser was to be the Norwest Bank holding company, which owned a bank in Casper.

However, on Sunday, as the purchaser was preparing to send its staff to Lander to assume possession, the FDIC contacted the purchaser and raised the price substantially. The purchaser refused to pay the increased demand. It was too late to take bids and arrange for

another sale before Monday, so the FDIC, as Receiver, closed the Bank the following day (Monday).

Appellant Nicholas offered her services and assistance to the Receiver. The offers were rejected. Upon reading in the newspaper the following March that the FDIC Receiver was terminating all local employees and physically removing all remaining property to Denver, appellant transmitted the letter, a copy of which is Appendix 12 to this Brief. There was nothing further the appellants could do in the matter.

Appellants heard nothing from the FDIC Receiver thereafter until December, 1987, when a Colorado attorney telephoned each of the appellants and invited them to a directors' meeting to be held in Denver on January 8, 1988. That telephone call was followed by the letter, a copy of which is annexed as Appendix M to this Brief.

There is a substantial difference between the loans mentioned in that letter, and discussed at the January 8th meeting, and those loans pleaded in the First Amended Complaint by the plaintiff FDIC Receiver. Even at that late date, more than three years after it closed the Bank, and after an extensive investigation, the FDIC Receiver did not know whereof it would eventually charge the appellants.

D. The FDIC's investigation took three years, during which time the appellants had no access to Bank records and no means to discover their claims against the appellees

After the Bank was closed in November, 1985, it took the FDIC Receiver more than three years to discover enough about the facts to file its lawsuit against the Bank officers and directors, including appellants. During that three years, it had the services of: (1) the Federal Reserve bank examiners, with as many as five persons at a time working on Yellowstone Bank affairs; (2) the office of the Wyoming State Examiner, with three or four persons at a time; (3) its own staff of twelve or more persons, including hold-over accounting department personnel of the Bank who worked for several months after the Bank was closed; (4) virtually unlimited staff and resources of the Denver law firm of Holland & Hart, including two lawyers and their secretaries whose principal efforts for several months were devoted to the matter; and (5) FDIC staff counsel and supporting personnel. Moreover, the FDIC enjoyed a close working relationship with the FBI. Several (three or more) special agents of the FBI worked, from time to time, over three years to produce the information which the federal grand jury relied upon to indict two of the appellees regarding the matter which is the subject of this lawsuit.

All of the work and investigations of all those agencies was kept secret from the appellants whose attempts to assist were rebuffed except for their personal appearances before the grand jury. Those agencies, having complete possession and control of the Bank and its records, deliberately kept the appellants ignorant of what had

transpired earlier, of what the agencies were doing, and of what they were learning – until January of 1988.

The records which related to suspected criminal activity were taken to Denver immediately. The remainder of the Bank's records were moved to the FDIC office in Denver a few months after the Bank was closed. Literally every bit of information which did not specifically relate to one's personal account became a government secret, inaccessible except through a court order. No information whatever was available to the appellants, and they could not have discovered the information which they did not have at the time the bank was voluntarily surrendered by the directors to the State Examiner. In addition the earlier examiners' and regulators' investigative reports which had been delivered to the appellees had been concealed from the appellants by them.

E. Appellees actions prevented Appellants from discovering their damage.

Based on information given by the FBI investigators to other witnesses at the federal Grand Jury hearings, and glimpses at selected bank records afforded to appellants' counsel by the FDIC in 1988 and by Court order in 1990, appellants believe that the senior members of appellee law firm and others were guilty of massive fraud and criminality, only part of which is disclosed by the grand jury indictment and by the reports of the bank examiners and regulators, which appellants did not receive until March, 1988.

Efforts by the FDIC Receiver and bonding companies, in collateral litigation, to obtain access to the

grand jury files have been rebuffed by the federal district court to date. It is probable that appellants will obtain access to those records if appellants are able to mature this litigation to the discovery stage. That has not been possible because of the summary disposition of the case by the trial and appellate courts.

Appellants submit that their pleadings justify maintenance of the claims they have pleaded at least sufficiently to enable them to engage in discovery to ascertain the facts. Appellants are reliably advised and believe that there are other, stronger claims than those pleaded to date. The strictures of W.R.C.P. Rule 11 prevent appellants from pursuing additional claims without more reliable information which must be obtained by discovery. Appellants claim the right to pursue those matters, the same as commonly available to all other litigants. Appellants may not be deprived of such right except through due process of law.

It is unreasonable and unfair for the Court, on its surmise, to hold appellants accountable for what appellants could not do, and could not reasonably have known or discovered even three years after the bank was closed.

II. Appellants Were Prevented by Substantive Law From Suing the Appellees During the First Two Years After the Bank was Closed. They had no cause of action. Their claims would have been non-suited.

A. The Statute of Limitations did not begin to run against appellants' claims until 1988 when appellants were damaged.

"[T]here can be no cause of action until there is injury." *Banner v. Town of Dayton* (Wyo. 1970) 474 P.2d 300, 302-305. In that case, this Court cast our state as a 'discovery' state, holding that a cause of action does not accrue until the plaintiff discovers the injury.

That principle continues through an unbroken line of cases, including decisions written or concurred in by virtually every member of the Court since 1970. The cases include *Bredthauer v. Christian, Spring, Seilbach and Assoc.* (Wyo. January 24, 1992) ___ P.2d ___ (surveyor's error); *Mills v. Garlow* (Wyo. 1989) 768 P.2d 554 (accountant's error); *Sharsmith v. Hill* (Wyo. 1988) 764 P.2d 667 (medical malpractice); *Duke v. Housen* (Wyo. 1979) 589 P.2d 334, cert. denied, 444 U.S. 863 (1979) (sexual transmission of disease); *David v. City of Casper* (Wyo. 1985) 710 P.2d 827 (public employee omission); *Simons v. Laramie County School District* (Wyo. 1987) 741 P.2d 1116 (reduction of foundation entitlement); *Anderson v. Bauer* (Wyo. 1984) 681 P.2d 1316 (home builder warranty); *ABC Builders, Inc. v. Phillips* (Wyo. 1981) 632 P.2d 925 (vendors of residential property).

As if pre-sage to the current 'discovery' statute covering all licensed and 'certified professional' services, the *Banner* decision read as follows (p. 304):

> Other courts have found that a variety of tort actions fall within a class of cases where " 'the period of limitation may and should fairly and justly be said to begin to run when the plaintiff knows or has reason to know' " the existence of the cause of action. (citation) Such a result is consistent with the holding of this court in the case of *Town Council of Hudson, v. Ladd* . . . .
>
> . . . . in our view the focal statement there (in *Ladd*) is equally applicable here: "The line of demarcation seems to be in the certainty or uncertainty of injury to plaintiff's property.

Without attempting to cover every application of the prior cases to this case, the following quotations typify current Wyoming law.

> The statute of limitations does not begin to run against a negligence action until some damage has occurred. *Duke v. Housen*, 340; *ABC Builders*, 939.
>
> The statute of limitations begins to run when the injured party knows or reasonably ought to know that some damage has resulted from the wrongful act. That is true although the damage is slight, continues to occur, or additional damage by the same wrongful act may result in the future. *Anderson v. Bauer*, p. 1320, citing *Duke* and *ABC Builders*.

B. Appellants pleaded that they were not damaged until January, 1988.

There is nothing before this Court regarding the timeliness of appellants' claims other than the appellants' pleadings, the averments of which must be taken as true.

Appellants pleaded that they were not damaged until January, 1988 at the earliest (R 460 and 518):

> (b) Plaintiffs cross-claims and third party claims matured, that is they *first became actionable claims for relief, in January, 1988,* when plaintiff(s) learned that the Receiver (of the Yellowstone Bank) had prepared and would press claims against her (him). Several did not mature until November 22, 1988, when she (he) received the Complaint in this action containing new disclosures. Several matured more recently upon more recent discoveries. Plaintiff has not undertaken to catalog the dates of each new discovery, it being apparently sufficient at this time to concern regarding only the earliest dates. (Emphasis added).

In the body of the specific claims, appellants further pleaded (R. 944, 976):

> . . . . plaintiff recently discovered the negligent conduct and other violative and insufficient conduct which is the subject of this claim . . .

and again (R. 946, 978):

> The defendants services were rendered under circumstances as gave rise to individual causes of action of behalf of individual directors. Those causes of action do not mature until the director's discovery of the negligence. *None of those claims in this case matured before January of 1988,* when the Receiver first threatened this plaintiff regarding matters as to which she (he) had reasonably relied upon the professional legal services of defendants. (Emphasis added).

On the motions to dismiss those allegations must be considered true, as a matter of law. To treat them otherwise without a hearing and evidence is error.

C. Appellants were precluded by law from asserting claims against appellees until appellants were damaged.

Had appellants sued the appellees within the first two years after the bank was closed on November 1, 1985, as the Court's decision now appears to require, or sued at any time before January, 1988, the action would have been dismissed. Appellants had no cause of action under the decisions of this Court:

> In other words, a tort is not complete and actionable until all elements, duty, breach, proximate cause, and damage are present. *Davis v. Casper* p. 829, citing *Duke*. *Simons* p. 1120, citing *Duke*.
>
> A cause of action does not *accrue* until all of the elements (i.e., in a tort action, the elements of duty, breach, proximate cause, and damage) are present (emphasis in original). *Simons*, p. 1120, citing *Davis, Anderson*, and *Duke*.
>
> If a party seeking relief has not yet been damaged, an action is premature. *Simons v. School District*, p. 1120.

A suit against the appellees would not have withstood a motion to dismiss before the FDIC Receiver revealed to appellants its investigations and conclusions, and threatened litigation.

III. The decision singles out the legal profession as a limited class for special protection, placing added burden on the appellants who were injured by lawyers. It denies appellants equal protection and uniform operation of the law

A. Broad, lenient interpretation of limitations against professionals other than lawyers.

Without evidence, the majority opinion has concluded as a matter of law that ' "due diligence" on the part of appellants would require a determination as to the reason for the closure' of the Bank, 'and if appellee's negligence was a contributing reason for the closure, . . . the claims against appellees would mature at that time' because it was ' "reasonably discoverable" at the time of the closure or within a few months thereafter.' (p. 3, slip opinion). That conclusion appears discriminatory when compared to precedent involving other professions.

In *Mills* the defendant was the accountant who prepared plaintiff's 1982 income tax return. In March, 1985 the Internal Revenue Service notified the plaintiff that the 1982 return was to be examined regarding treatment of an exchange of property. Plaintiff met with the examining officer on April 4th. On July 10, 1985, the plaintiff received a proposed disallowance of the tax free treatment and assertion of $6,600 tax deficiency. Plaintiff consulted accountants in July and August, and administrative appeal was taken. In December, 1986 (16 months later) the appeal was denied. The plaintiff commenced a professional liability action against the accountant on September 30, 1987, two years and six months

after the IRS notified the plaintiff that there were problems on his return.

Taking cognizance and approving the decision of a Maryland case in which the IRS consumed three and one-half years before making an assessment, this Court held, as a matter of law, that the limitations period as to accountants in such a case does not begin to run until the IRS issues a notice of deficiency. Accordingly, the malpractice action was timely filed.

In *Bredthauer* the plaintiff claimed injury by licensed surveyors. The Court held that notice of survey discrepancies by a title insurance company did not trigger the running of limitations. It declined to decide whether information from a later re-survey, or a still later loss of a land sale, triggered running of the statute.

In *Sharsmith,* this Court invoked the extraordinary concept of "constructive involvement" to impute third party relationships to defendants in order to prevent the statute of limitations from running.

All three of those cases are good law. Actions against lawyers require equal application of the law.

B. Reference to the case against lawyers.

As this brief, appendices, and the record in this case show, the State Examiner took possession of the Yellowstone Bank by agreement. Thereafter, the FDIC Receiver closed it and all operations became secretive. For three years and two months, no person, no agency, and no institution gave any notice that there was anything amiss which might create liability in appellants for the loans

later sued upon, nor anything to suggest that claims could arise on account of wrongful acts or malpractice of the appellees. Appellants offered to help but were rebuffed. They continued to believe the loans were collectible from the borrowers.

The dismissal of appellants' claims appears to single out the legal profession as a limited class for special protection, placing an added burden on appellants who were injured by the attorneys. The decision treats legal malpractice victims differently from those injured by wrongful, incompetent or unprofessional conduct of licensed professionals other than lawyers. Such classification is arbitrary, unreasonable, and unrelated to the purposes of the common law of torts and professional liability. Therefore the decision denies appellants equal protection and uniform operation of the law. It violates Article I, Sections 2, 3, 6, 7, 8 and 34 of the Constitution of Wyoming, and the Fourteenth Amendment to the Constitution of the United States.

IV. Appellants have been deprived of due process of law.

Due process of law includes notice and opportunity to be heard. That notice, and the opportunity to be heard, are unquestionably incidental to affording due process of law. See *Bjugan v. Bjugan*, 710 P.2d 213 (Wyo. 1985); *Tanner v. Tanner*, 482 P.2d 443 (Wyo. 1971); *State ex rel Blonder v. Goodbrod*, 77 Wyo. 126, 307 P.2d 1073 (1957). Due process of law is guaranteed to a party who has a legitimate property interest at stake under the Fourteenth Amendment of the

> Constitution of the United States, and Article 1, Section 6 of the Constitution of the State of Wyoming.

The foregoing paragraph was copied from *Barker Bros. v. Barker-Taylor* (Wyo. January 15, 1992) ___ P.2d __.

The appellants alleged in their complaints that the statute of limitations did not begin to run until January, 1988. That is an allegation of ultimate fact. The allegations read as follows (Record pp. 460, 518):

> (b) Plaintiffs cross-claims and third party claims matured, that is they first became actionable claims for relief, in January, 1988, when plaintiff(s) learned that the Receiver (of the Yellowstone Bank) had prepared and would press claims against her (him). Several did not mature until November 22, 1988, when she (he) received the Complaint in this action containing new disclosures. Several matured more recently upon more recent discoveries. Plaintiff has not undertaken to catalog the dates of each new discovery, it being apparently sufficient at this time to concern regarding only the earliest dates.

Each of the complaints further alleged (Record pp. 944, 976):

> . . . . plaintiff recently discovered the negligent conduct and other violative and insufficient conduct which is the subject of this claim . . .

and further pleaded (R. 946, 978):

> The defendants services were rendered under circumstances as gave rise to individual causes of action on behalf of individual directors. Those causes of action do not mature until the director's discovery of the negligence. *None of*

> *those claims in this case matured before January of 1988,* when the Receiver first threatened this plaintiff regarding matters as to which she (he) had reasonably relied upon the professional legal services of defendants. (Emphasis added).

No motion, answer or other pleading controverted or attacked the sufficiency of those allegations in any way. The Court referred only to the allegations on pp. 944 and 976 in deciding the allegations not determinative, apparently disregarding the more specific allegations on pp. 466, 518, 946 and 978. It dispensed with the requirement that an affirmative defense be claimed and pleaded. Assuming undisclosed information, it found against the appellants as a matter of fact and as a matter of law. In so doing it deprived appellants of all their possible claims against the appellees and deprived the appellants of appellees' waivers of the limitations defenses, which waivers accrue to a claimant by operation of law if not pleaded. *Town Council v. Ladd*, 37 Wyo. 419, 242, 263 P. 703 (1928)

The Court's determination was made without notice, without the joinder of issue by any party, without evidence or any factual inquiry, without opportunity for appellants to be heard or to prove their allegations. They are denied their 'day in court'.

That allegations of a complaint will [sic] taken as true, for purposes of a motion to dismiss, is too well settled to require citation of authority. In disregard of that universal rule, this Court found against the appellants on the foregoing allegations, as a matter of fact and as a matter of law. It is like taking judicial notice that all banks fail for the same reason, a particular reason which always

obliges the directors to anticipate they are going to be sued at some future date and to investigate what the suit will be and try to muster their defenses before the lapse of two years, even if no damage occurs. Such summary disposition of factual matter is more grievous than the default which was rendered in *Lawrence-Allison v. Archer* (Wyo. 1989) 767 P.2d 989, which is analogous. The opinion of that case is paraphrased as follows:

Ordinarily the decision of a court is void, if rendered in a manner inconsistent with due process of law. The appellants have property rights in the choses of action against appellees; and a right in the waiver mentioned above. Due process of law in this context is guaranteed to a party with a legitimate property interest at stake, under the U.S. Constitution Amendments XIV and V, and Wyoming Constitution Articles 1, Sections 6, and 34. (Citing *White v. Board of Trustees of Wyoming Community College District,* 648 P.2d 528, 535 (Wyo. 1982))

This Court's affirmance of the dismissal of appellants' claims is based on impressions it formed from reading Appellant Runyan's brief regarding an issue which had not been raised in the district court. It is basic that determinative factual issues, and uncontroverted allegations of fact, may not be adjudged against the pleader unless there is a meaningful opportunity to be heard. A meaningful opportunity to be heard necessarily requires a hearing involving elements of formality and procedure dependent upon "the importance of the interests involved and the nature of the subsequent proceedings." (cited are a United States Supreme Court decision and a Wyoming decision).

The Court's decision against the appellants is dependent upon the Court's determination that the following are true:

(1) That the bank was closed November 1, 1985, for reasons having to do with the claims upon which the FDIC Receiver sued the appellants four years later, on November 21, 1989.

(2) If the appellants had been reasonably diligent in the succeeding 2 years, they would have discovered before November, 1987 that:

(a) the bank was closed because the appellees were previously negligent in their performance of duty owed to the appellants individually;

(b) such negligence would, except for delay, be actionable, including sufficient allegations and proof of cause for damages to accrue in the future, and sufficient allegations and proof of damage itself, if damage were to occur;

(c) such negligence would cause the FDIC Receiver to sue the appellants at some time in the future.

Appellants submit that had the FDIC Receiver never sued the appellants, the appellants would never have had a viable claim against the appellees. Until the January, 1988 meeting, appellants believed there were few outstanding loans which were not collectible; and that all the substantial loans were secured with adequate collateral.

Appellants submit that findings and conclusions of fact in all such regards should be rendered only after a fair hearing. Due process demands at least an informal

hearing for presentation of evidence, and an opportunity for explanations by the appellants, and the opposing parties. The Court should allow all parties to present evidence as to the facts, before making findings of fact that lead to a final judgment.

V. The Court Erred in Dismissing Appellants' Claims Which Are Not Subject to the Two-Year Statute of Limitations.

The Court's opinion affirmed the dismissal of all appellants' claims, including claims not subject to the two-year statute of limitations contained in W.S. § 1-3-107.

The FDIC Receiver and the appellees have contended all along that as a matter of law there could be no attorney-client relationship between appellants and attorneys for the Bank. For that reason the appellants therefore pleaded the amended claims alternatively. The Amended pleadings alleged professional malpractice/professional negligence/professional incompetence as would come within the two year statute of limitations of W.S. 1-3-107. They alternatively alleged violation of non-professional fiduciary obligations which appellees created and maintained with the appellants (R. 954 and following; 986 and following), deceit, fraud, and criminal activity and conviction therefore, in connection with the same obligations and bank funds for which the FDIC Receiver had sued the appellants (R. 944 and following; 974, 976 and following). They also pleaded an equitable cause of action for discovery (R. 957, 989).

Appellants' claims which are not based on professional malpractice/professional negligence/professional

incompetence, any claims for which the professional relation is not essential, do not fall within the two year limitations of W.S. § 1-3-107, but are within the four year provision of W.S. § 1-3-105. The Court has not suggested the alternative included causes of action were time-barred.

The sweep of the district court's sending this case on to the Supreme Court for determination of the lawyers' liability aspects prior to trial, and of the Supreme Court's affirmance on other grounds, has resulted in the wrongful dismissal of appellants' alternative causes of action.

At the least, if the causes of action for professional services are to be dismissed, the causes based on non-professional and fraudulent and criminal misconduct should not be.

Respectfully submitted,

/s/ John M. Burman
John M. Burman
Corthell & King
P. O. Box 1147
Laramie, Wyoming 82070
(307) 742-3717
Attorney for Appellants

/s/ Stephen N. Goodrich
Stephen N. Goodrich
Nicholas Law Firm
P. O. Box 928
Laramie, Wyoming
(307) 742-7140
Attorney for Appellants

## APPENDIX F

IN THE SUPREME COURT, STATE OF WYOMING

| | | |
|---|---|---|
| LEWIS BOLLER and ALICE NICHOLAS, Appellants (Third-Party Plaintiffs), v. WESTERN LAW ASSOCIATES, P.C., JOHN T. PAPPAS, L.M. CHIPLEY, H. CODY RUNYAN and GREGG A. PARISH, Appellees (Third-Party Defendants), and JOHN L. VIDAKOVICH, APPELLEE (Cross-Defendant). | ) | No. 90-84 (Filed April 20, 1992) |

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING

STATE OF WYOMING )
County of Albany ) ss

Being duly sworn, appellant Alice Nicholas deposes and says:

a. I have read the brief. Th facts set forth in it are true. The summaries, factual conclusions, argument and matter set forth on information and belief are true as I verily believe.

b. Prior to January of 1988, I did not realize or know of any injury or damage to me regarding any of the

claims which were later set forth in the FDIC Receiver's complaint.

c. Had anyone told me, prior to the meeting with the FDIC attorneys in Denver in January, 1988, that I had a claim against the appellees and must sue them or lose the claim, I would have responded, "What for?"

I was embarrassed about the closure of the bank. I believed it was wrong. I believed that it occurred because the FDIC breached its agreement with the directors and the State Examainer [sic] to sell the bank, to not close it. I believed that the bank was surrendered to the State Examiner because of the threat of loss of depositors' insurance, which was brought about by inability to raise more capital, which was demanded on account of a threatened impairment of capital, which threat was brought about by the Federal Reserve and FDIC reclassification of sound loans as 'risky' loans, which was done in the course of the Federal Reserve's efforts to restructure the entire banking industry. That is what the appellees, Mr. Vidakovich and Mr. Pappas, represented to the directors, both before the bank was closed and after it was closed.

d. At the time the bank was surrendered, and thereafter until the meeting with the FDIC attorneys and Receiver in Denver, in January, 1988, I believed that all the significant outstanding loans of the bank were adequately secured, and that there was not a significant amount of uncollectible loans.

e. Regarding the $1.5 million to $3 million of loans for which the FDIC Receiver sued me and other directors in the original lawsuit: Only a relatively small portion of 3 of those loans were submitted to the Board of Directors for approval before the funds were disbursed from the bank.

In 1983 the Board approved a $70,400 loan to appellee John T. Pappas. It approved a $40,000 loan to Star Stations for operating funds. It approved a substantial line of credit, some $200,000, to Sims Construction, based on collateral valued at several times over that amount.

I learned from my lawyers in 1988 that Mr. Pappas had withdrawn nearly $185,000 as loans to him. I first learned from my lawyers in March, 1988, that Sims Construction had received some $800,000 in loans, and the collateral had apparently been released, or just disappeared – the FDIC Receiver could not find it. I learned for the first time from the records obtained from the FDIC Receiver sometime after January, 1988, that at the time the board approved the $40,000 loan to Star Stations, an enterprise of appellee Vidakovich's son John, that some $250,000 to $300,000 funds from the bank had already been disbursed to Star Stations, as loans.

Merely because the FDIC Receiver found promissory notes and other documents among the bank records from which they classified the transactions as loans, it should not be presumed that the fund disbursements were bona fide loans. From the FBI investigations and other sources we know now there were many instances in which the appellees (excluding Gregg Parish) obtained loans which were not known to, and were not approved by the Board of Directors. We have learned there were ostensible loans to 'straw borrowers', for which the funds were paid directly to the appellees or other members of appellees' family.

e. Wherein it is argued in the appellate brief of appellee H. Cody Runyan, that I and the other directors received notice from the bank examiners' reports which should have alerted us to potential claims

against the appellees much earlier, that argument is based on false premise.

The fact is that I did not, and the other directors did not receive those reports. For reasons which have not yet been explained, the examiners drafted their several examination reports as if they were addressed to the directors; but in every case those reports were delivered only to the bank management, appellees Vidakovich and Pappas.

The directors were advised and instructed by appellees Vidakovich and Pappas that the reports were highly confidential, and to be treated as secret. Those appellees characterized the tenor of the contents of the examiners reports, to me and to the other directors, in appellees' own fashion. They did not tell of the true contents wherein the competency, integrity and various practices of the appellees and bank management were criticized. As we know now, the adverse parts were cleverly and deliberately concealed from us.

We first learned of the nature of the contents of those reports at the meeting in Denver in January, 1988. We first saw the reports after the FDIC Receiver provided copies to my attorneys in March, 1988.

In Testimony Whereof, I set my hand April 20, 1992.

/s/ Alice Nicholas
Alice Nicholas

Subscribed and sworn to before me April 20, 1992.

/s/ Kathi A. Rickard
Notary Public

[SEAL]

KATHI A. RICKARD - NOTARY PUBLIC
My Commission Expires Jan. 10, 1996

---

## APPENDIX G

**In the Supreme Court, State of Wyoming**

**April Term, A.D. 1992**

| | | |
|---|---|---|
| LEWIS BOLLER and ALICE NICHOLAS,<br><br>Appellants<br>(Third-Party Plaintiffs),<br><br>v.<br><br>WESTERN LAW ASSOCIATES, P.C., JOHN T. PAPPAS, L.M. CHIPLEY, H. CODY RUNYAN, and GREGG A. PARISH,<br><br>Appellees<br>(Cross-Defendants and Third Party Defendants).<br><br>v.<br><br>JOHN L. VIDAKOVICH,<br><br>Appellee<br>(Defendant). | ) | No. 90-84<br><br>(Filed April 28, 1992) |

**ORDER DENYING PETITION FOR REHEARING**

The appellants having filed a Petition for Rehearing in this matter, and the Court having carefully considered the same,

IT IS ORDERED that appellants' Petition for Rehearing be, and the same hereby, is denied.

FOR THE COURT*

/s/ Walter Urbigkit
Chief Justice

---

* Thomas, J., would have granted the petition.

## APPENDIX H

IN THE SUPREME COURT OF THE STATE WYOMING

---

BRIEF OF APPELLEE H. CODY RUNYAN

---

The following extract is a complete rendition of all matter in the brief relating to the statute of limitations.

III. THE DISTRICT COURT'S DECISION WAS CORRECT BECAUSE PLAINTIFF'S COMPLAINT WAS BARRED BY THE STATUTE OF LIMITATIONS.

The applicable Statute is W.S. § 1-3-107 (1977) and it provides in pertinent part as follows:

> "(a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:
>
> (i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
>
> (A) Not reasonably discoverable within a two (2) year period; or
>
> (B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence . . . ".

The First Amended Complaint reveals that the 20 specific loans upon which losses where [sic] taken and which in turn resulted in the cause of action against appellants occurred between February 28, 1983 and August 21, 1985. (R. 260) It stands to reason, then, that any act, error or omission which caused the making of one of those loans would have occurred before August 21, 1985. Two years from that date would have been August 21, 1987. Another date that the Court might consider, which date is undisputed, is that the bank was closed on November 1, 1985, (R. 258), two years from that date, of course, being November 1, 1987. The Third Party Complaints were filed on August 14, 1989. Without any questions or even dispute, more than two years elapsed after any alleged act, error or omission which generated any of those loan losses. Appellants, of course, recognize that and seek to rely on the exception or perhaps a misunderstood application of that exception.

This Complaint does not qualify for the "not reasonably discoverable" exception; indeed the third party complaint does not even allege that the act, error or omission was not discovered, despite the exercise of due diligence. The two exception sections have to be read together. If the exercise of due diligence would have disclosed the cause of action then the statute begins to run. "Reasonably discoverable", and "exercise of due diligence" are not really two exceptions as applied to this circumstances [sic], but one. It is respectfully suggested that when the examinations of the bank were made by the regulatory agencies, criticizing the loan portfolio and the governing operations in the bank, that the directors were on notice of the alleged improper advice given them by the

bank attorneys. (See Argument II) The First Amended Complaint reveals that the latest of those examinations was on the September 9, 1985. The directors by the exercise of due diligence would have known of the contents of those examinations. Certainly by the time that the bank was closed, with consent of the directors, because of the shape of the loan portfolio, the directors would have been on notice that something was wrong with the lending practices in the bank. If, as alleged, those lending practices were based upon advice of legal counsel, then appellants were on notice that legal counsel had committed some act, error or omission by November 1, 1985.

Appellants seek to toll the Statute until January of 1988 at which time they contend they were first informed that the receiver may hold them personally liable for losses sustained on the loans. The only way that theory can be sustained is if the appellants can persuade this Court that they personally suffered no damage prior to that date and that their ignorance of the law (that loans made in violation of law or improvidently can result in personal liability) is an excuse not to realize that they had personal exposure on the criticized loans. It clearly is not necessary that the appellants know the exact dollars and cents of the loss, but simply that they have been damaged, in order for a cause of action to be complete and for the statute to run. The truth of the matter is that the plaintiff was the one that had a cause of action, if any existed, against appellees and with a full knowledge of all of the facts pursued only one member of the law firm, John L. Vidakovich.

* * *

---

## APPENDIX I

IN THE SUPREME COURT OF THE
STATE OF WYOMING

---

APPELLANTS' REPLY BRIEF

FILED AUGUST 31, 1990

---

The following extract is a complete rendition of all matter in the brief relating to the statute of limitations argument in Appellee Runyan's Answer Brief.

3. *Appellees' Third Issue is Another unlisted issue, and argument.*

*It is another Non-Issue in this appeal.*

Pages 20-23 of Mr. Runyan's Brief contends that the Appellants' claims are barred by the statute of limitations. Appellants submit that the contention is purely factual, and of no moment on a motion to dismiss based on the sufficiency of the complaints. Further, no statute of limitations issue was raised, argued, or ruled on in the district court.

The Appellees argue that since the 'loans' the FDIC sued upon were dated prior to August, 1985, and since the bank was closed in November, 1985, the Appellees' malpractice in regard to them must have occurred more than two years before the Third-party Complaints were filed in 1989, and Appellants should have discovered the defaults and malpractice more than two years earlier.

The Amended Complaints, deemed to be true on this appeal, allege the "recent" discovery of Appellees' shortfalls (R. 976), and allege a factual basis to support a finding that the statute did not begin to run before January, 1988 (R. 978). The face of the Amended Complaints do not show that the statute has run. Appellees must answer the complaint, deny the allegations, and allege their defense of limitations if they wish to contest these allegations. Also, the pleadings demonstrate that Appellants relied on misinformation provided them by the Appellees, which resulted in Appellants not discovering the defalcations sooner. As above shown, equitable estoppel will also prevent the Appellees from establishing a statute of limitations defense.

* * *

---